THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

August 25, 1950

Hon. Roy L. Hill
County Attorney
Runnels County
Ballinger, Texas

Opinion No. V-1098.

Re: Authority of the County to prevent a land owner from closing a road across his land.

Dear Sir:

Your request for an opinion reads in part as follows:

> "In the year 1939, a number of citizens together with the owner of land, over which the road was established, agreed on the community using the road across his ranch; this was a permissive and agreeable use on the part of the owner. They sought help from the County in maintaining the road, and the Commissioner used his machinery in grading, filling in, building cattle guards, etc. on the road, and such work is still being done, as I understand. The road is now, and has been used by the general public, and a school bus route has been maintained, and is now being so used on this road. The son of the original owner now wants to close the road . . ."

You ask whether the landowner can close the road in question.

It was held in Evans v. Scott, 83 S.W. 874, 877 (Tex.Civ.App.1904):

> ". . . There were two theories upon which the appellees sought to restrain appellant from interference with the public's use of the road and the closing of the same; First, an implied dedication to such use by appellant and those under whom he claimed; second, the acquisition of the right on the part of the public to use the road by prescription. These respective claims of right to the use of a highway rest upon and are

governed by essentially different principles of law. It is said that an implied dedication is one arising by operation of law from the acts of the owner, and is founded on the doctrine of equitable estoppel. Elliott on Roads and Streets (2d Ed.) § 123. It is essential in such case that the owner intended to set the land apart to the use and benefit of the public. This need not be evidenced by deed. 'It is enough that there has been some clear, unequivocal act or declaration of the proprietor evidencing an intention to set it apart for a public use,' and that there has been an acceptance on the part of the public. The length of time the road has been used by the public is of no consequence, unless it becomes important, in connection with other circumstances, to show an intention on the part of the owner of the land to dedicate it to the public. Oswald v. Grenet, 22 Tex. 94; Preston v. City of Navasota, 34 Tex. 684; City of Corsicana v. Anderson (Tex.Civ. App.) 78 S.W. 261; Elliott on Roads & Streets, §§ 160, 161. Unlike an implied dedication, which, as we have seen, operates by way of estoppel in pais rather than by grant, a right by prescription rests upon the presumption that the owner of the land has granted the easement, and that the grant has been lost. City of Austin v. Hall, 93 Tex. 591, 57 S.W. 563; Saunders v. Simpson (Tenn.Sup.) 37 S.W. 195. To sustain this claim it is not necessary to show intent on the part of the owner of the land to set apart the road to the use of the public, and the element of acceptance is not involved; whereas the length of time the road has been used by the public is the foundation upon which the claim rests, and the use upon which the right is predicated must have continued uninterrupted under an adverse 'claim of right' for the full prescriptive period. . . . The public's right of prescription to a highway is not dependent upon the recognition of that right by the municipal authorities of the

county, but is acquired by adverse use for the time and in the manner prescribed by the rules of law to which we have adverted. Acts done by the municipal authorities of the county in recognition of the road in question as a public highway would doubtless be facts or circumstances evidencing the acceptance of it under appellee's theory of dedication, but the absence of such acts would not prevent the acquisition of the right on the part of the public to use the road by prescription. Public use in the manner stated and for the necessary period of prescription establishes the public right as firmly as if it had been created by an express grant. Furthermore, a suit to establish a right to use a way claimed by prescription is in the nature of or analogous to a suit to recover land, based upon a title acquired by adverse possession under our statutes of limitation, although the interest which may be acquired by prescription is only an easement, and not an estate in fee; and, where the prescriptive period, as in this state, is not fixed by statute, we conclude the longest period of limitation in actions for land, which is 10 years, will,by analogy, apply. Hence we hold that 10 years is the period of prescription in this state, and the court correctly so charged."

It was held in Phillips v. T. & P. Ry. 296 S.W. 877, 880 (Tex. Comm.App.1927) that "the public may by adverse use for the prescriptive period, which is ordinarily 10 years in this state, acquire the line of highway in a road though the counties have not recognized it as such."

In Black v. Terry County, 183 S W.2d 685, 687 (Tex.Civ.App.1944), it was held:

"The law is well established in this State that whenever the owners of land obtain knowledge of the fact that the county, claiming the right to maintain a road and, acting through its road overseer, takes actual and visible possession of the land over which it runs by working it or preparing it for public travel, thereby asserting a claim

> to it for the public in such manner that the owners, if present, would have ascertained the fact that the road was being established in behalf of the county and the public generally, the period of limitation or prescription begins to run. The testimony shows that J. S. Black had possession of the entire Section 25 until his death and since his death, J. H. Black has maintained possession for himself and the other appellants constantly and continuously. He admitted in his testimony that there probably was a road or passageway along the north line of Section 25 ever since the Forrister schoolhouse was erected, and stated that he put some of the section in cultivation in 1928. But whether any of the appellants had actual knowledge of the road or not, according to the testimony it was laid out by the citizens of Terry County and worked or 'scraped out' in 1924 by the county authorities and graded by them in 1927. Even if the appellant, J. H. Black, who represented the other appellants, did not have actual knowledge of the establishment of the road, he was charged with such knowledge because he undoubtedly would have known about it if he had been present at the time and would have known of the public travel over it at any time afterwards. These acts of establishing the road and the general travel over it having occurred more than nineteen years before appellants filed this suit or made any effort to discontinue the road, the County and the public acquired title to it by prescription."

In view of the foregoing, it is our opinion that when a county maintains a road by working it or preparing it for public travel, thereby asserting a claim to it for the public in such a manner that the road is established for the benefit of the county and the public generally, the period of prescription begins to run. The period of prescription in this State is 10 years. Whether the road in question has been acquired by Runnels County by prescription is a fact question which this office cannot answer.

SUMMARY

A county may acquire a public road by prescription, which in this State is 10 years. When a county maintains a road by working it or preparing it for public travel, thereby establishing a claim to the road for the public in such a manner that the road is established for the benefit of the county and the public generally, the period of prescription begins to run.

APPROVED:

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Yours very truly,

PRICE DANIEL
Attorney General

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